

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

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JOEL F. HOLUBAR,	:	
&	:	
MARIANA H. HOLUBAR,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	03-CV-12404-NG
KENT KHLBERGER;	:	
THE CHASE FREEMAN-FAMILY TRUST;	:	
&	:	
M/Y CHEROSA, <i>in rem</i> ,	:	
	:	
Defendants.	:	
	:	

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AFFIRMATION IN OPPOSITION TO DEFENDANTS CROSS MOTION

I, BJORN J. HOLUBAR, an attorney admitted *pro hac vice* to practice in the District of Massachusetts, Boston and the USDC in the State of New York and the Courts of the State of New York, being duly sworn, affirm as follows:

1. I am principal trial counsel to Plaintiffs, Joel and Mariana Holubar and am familiar with the facts relevant to Motion now before the Court.
2. This Affirmation is submitted in Opposition to defendants' cross motion to strike which is without any legitimate basis and questionable in its own right.
3. Pursuant to Local Rules 7.1 and 37.1, Kurt Bratten, Esq. and I initiated and held telephone conferences with Edward Radzik, Esq. and then Curtis Pfunder, Esq. at approximately 3:40 p.m., June 14, 2004 and 2:00 p.m., June 15, 2004, respectively. Exhibit 2. The conferences with Messrs. Radzik and Pfunder were held concerning the disputed discovery matters that are the subject of Plaintiffs' Motion Pursuant to Rule 37.

4. During the above-referenced conferences, Mr. Bratten and I attempted, in good faith, to resolve and/or narrow the areas of disagreement to the greatest extent possible with counsel to the Defendants.

5. On Tuesday, June 15, 2004 12:00 AM, I served by email Plaintiffs' 1) Notice of Motion and Motion, 2) Affirmation in Support, 3) Memorandum of Law in Support, 4) Rule 7.1 Certification, 5) Affidavit of Joel F. Holubar and 6) Certificate of Service on Mr. Pfunder and Bratten. The same was also dispatched via regular mail on June 14, 2004. Exhibit 1.

6. On June 16, 2004, Mr. Bratten prepared and sent a letter to the Office of the Civil Clerk for the United States District Court for the District of Massachusetts.

7. Pursuant to Mr. Bratten's June 16, 2004 letter, copies of Plaintiffs' Motion Pursuant to Rule 37 - including a Local Rule 7.1 Certificate of Compliance - were filed with the Court, and defendants' counsel provided copy of the same.

8. Defendants' assertions the Plaintiffs' motion is premature etc. wholly incorrect and misses the most salient point – the time by which defendants were to have responded expired.

9. Rather than acknowledge that the defendants blew a filing date the defendants attempt to and would mislead the Court in granting the extension as well as in dismissing Plaintiffs' R37 motion. Defendants time to respond had run as such their requested extension misplaced and as such defendants' requests for admissions must now all be deemed admitted, among other relief sought.

9. Addressing the depositions, had Plaintiffs' counsel not initiated a call to defendants Plaintiffs would have incurred costs and inconvenience for no reason whatsoever.

Defendants have and continue to approach this matter with callous disregard for the facts and schedules set by the Court and others.

10. Defendants seek to and have effectively delayed and circumvents this Courts Scheduling Order and time schedules.

11. This will further serve as Plaintiffs objection to the Friday, July 9, 2004, 5:37pm phone call of Mr. Pfunder whereby Plaintiffs' counsel was informed that Mr. Pfunder was leaving for "a long planned vacation" and Mr. Radzik predisposed. Had this actually been the fact why then did defendants' counsel wait until: after business hours, on the Friday preceding the scheduled hearing to inform anyone of the same. Additionally, while never having been served on counsel defendants directed a communication to the Court prior to and without consultation of Plaintiffs' counsel. Plaintiffs object to and defendants' requested adjournment and would respectfully request the Court instruct Mr. Radzik, who is admitted *pro hac vice* in this matter, and who is a partner in a many member firm, to appear for the scheduled hearing on July 15.

11. Defendants Opposition and Cross Motion containing assertions regarding the lack of compliance with local rules is a rouse and gravely misplaced.

WHEREFORE, it is respectfully requested that the Court grant Plaintiffs' their requested relief.

Respectfully submitted,

Dated: July 13, 2004

/s/ Bjorn J. Holubar
Bjorn J. Holubar (BH-9691)
770 Lexington Avenue, 7th Fl
New York, New York 10021
1-516-446-1546
1-212-755-4199
bholubar_esq@hotmail.com

Email Dispatch Confirmation

EXHIBIT 1

----- Original Message -----

From: [Bjorn J. Holubar](#)

To: [Curt Pfunder](#)

Cc: kurt.bratten@gesmer.com

Sent: Tuesday, June 15, 2004 12:00 AM

Subject: Holubar v Kholberger, notice of motion et al

Your files are attached and ready to send with this message.

Rule 7.1 Certification

EXHIBIT 2

**UNITED STATES DISTRICT COURT
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&	:	
M/Y CHEROSA, <i>in rem</i> ,	:	
	:	
	Defendants.	:

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LOCAL RULE 7.1 CERTIFICATE OF COMPLIANCE

Counsel for plaintiffs, Joel F. Holubar and Mariana H. Holubar, hereby certifies that, pursuant to Rule 7.1(A)(2) of the Local Federal Rules of Civil Procedure, he (1) conferred with counsel for the defendants regarding the Motion to Compel and for Rule 37 Sanctions, filed herewith, and (2) has attempted in good faith to resolve or narrow the issues presented.

JOEL F. HOLUBAR
and MARIANA H. HOLUBAR
By their attorneys,

Date: June 15, 2004

Lee T. Gesmer (BBO #190260)
Kurt Bratten (BBO #644730)
Gesmer & Updegrove, LLP
40 Broad Street
Boston, Massachusetts 02109

Bjorn J. Holubar, *pro hac vice*
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1-212-755-4199 (fax)

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FOR THE DISTRICT OF MASSACHUSETTS**

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M/Y CHEROSA, <i>in rem</i> ,	:	
	:	
	Defendants.	:
		-----X

CERTIFICATE OF SERVICE

I, Bjorn J. Holubar, hereby certifies as follows:

I am an attorney-at-law of the State of New York and admitted to the Bar of this Court *pro hac vice*. I hereby certify that on this 12th day of July 2004 I caused copies of: Plaintiffs' Affirmation in Opposition of Bjorn Holubar and Affidavit in Opposition of Kurt Bratten to be served via email & REGULAR MAIL upon the following:

Curtis C. Pfunder
92 State Street
Boston, Massachusetts 02109

Edward C. Radzik, Esq. – MAIL ONLY
Donovan Parry McDermott & Radzik
Wall Street Plaza
88 Pine Street
New York, New York 10005-1801

DATED: July 12, 2004